United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1901

B P/S

To be argued by
V. THOMAS FRYMAN, JR.

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 74-1901

UNITED STATES OF AMERICA,
Appellee,

—v.—

KARL "JACK" SCHWARTZBAUM,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
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Preliminary Statement

Karl "Jack" Schwartzbaum appeals from a judgment of conviction entered on June 4, 1974, in the United States District Court for the Southern District of New York following a four day trial before the Honorable Lawrence W. Pierce and a jury, and orders of the District Court dated June 4, 1975, and June 5, 1975, denying motions to dismiss the indictment and for a new trial.

Indictment 73 Cr. 616, filed on June 21, 1973 (App. 3-5),* charges four employers in the fur industry—

* "App." refers to pages of Appellant's Appendix; "Tr." refers to pages of the trial transcript; "Summ." refers to pages of the transcript of summations; and "GX" refers to Government Exhibits received in evidence.

Schwartzbaum, Sam Sherman, Harry Hessel, and Sol Cohen—with making payments of money specified in 13 counts to representatives of the Furrier's Joint Council, a labor organization which represented their employees, in violation of Title 29, United States Code, Section 186(a). On March 13, 1974, the District Court granted the defendants' motions for separate trials and set the trial of Hessel for March 25, 1974, with the trials of Cohen, Sherman and Schwartzbaum to follow in that order.

On March 22, 1974, the District Court accepted Sherman's plea of guilty to one count, and on March 25, 1974, the District Court accepted guilty pleas of Hessel and Cohen to one count each. Schwartzbaum's trial thereafter began on April 1, 1974, and concluded on April 4, 1974, when the jury returned a verdict of guilty on counts 9, 10, and 11 charging three payments by him in the amount of $150 each during 1969. Count 12 charging one payment of $150 in 1970 was dismissed at the close of the Government's case with the consent of the Government (Tr. 363-64).

The District Court denied Schwartzbaum's first new trial motion in a Memorandum and Order dated May 14, 1974 (App. 38-43). On June 4, 1974, the District Court announced that Schwartzbaum's second new trial motion would be denied by an endorsement order to be filed with an opinion denying a similar motion in *United States* v. *Stofsky*, 73 Cr. 614 (App. 134-35). An Endorsement Order dated June 24, 1974, was thereafter filed (App. 106). Also, on June 4, 1974, Judge Pierce sentenced Schwartzbaum to pay a fine of $1,000 on each of counts 9, 10, and 11, or a total fine of $3,000.

On June 11, 1974, Schwartzbaum filed a notice of appeal to this Court. Thereafter, Schwartzbaum and the

Government entered into a stipulation staying the appeal pending determination of a further new trial motion in the District Court, which stipulation was so ordered on September 23, 1974 (App. 176-78). Schwartzbaum then filed papers in the District Court in support of a third motion for a new trial, which motion the District Court denied by an Endorsement Order dated June 5, 1975 (App. 279-81), and papers in support of motions to dismiss the indictment, which motions the District Court denied by Endorsement Orders dated June 4, 1975 (App. 290-95). On July 15, 1975, Schwartzbaum filed a notice of appeal from the orders denying his third motion for a new trial and his motions to dismiss the indictment, together with a motion for an order enlarging his time to appeal.

Statement of Facts

A. The Government's Case.

1. Violation of Labor Agreements.

Schwartzbaum was the sole stockholder of K. J. Schwartzbaum, Inc. ("KJS"), a firm that manufactured fur garments (Tr. 4). The firm was located at 224 West 30th Street, in the heart of Manhattan's fur district extending from 27th Street to 30th Street between Sixth and Eighth Avenues (Tr. 40, 66). KJS was a member of the Associated Fur Manufacturers, Inc., an industry organization of fur manufacturers which entered into collective labor agreements on behalf of its approximately 325 members with the fur workers' union, the Furrier's Joint Council (Tr. 6, 40). In 1968, KJS employed 10 to 13 union employees in its manufacturing plant (Tr. 5). Under the terms of the labor agreement in effect in 1968, KJS was required to make substantial payments to the union health and welfare funds on behalf of each of its

union employees and to guarantee each employee a minimum yearly period of employment (Tr. 10).*

In 1968 Schwartzbaum decided to increase the volume of KJS business without hiring more union employees in two ways: by importing finished fur garments from other countries and by "contracting" non-union labor in other fur shops in New York City (Tr. 8-10, 20). Through these practices Schwartzbaum could decrease the cost of labor for the firm since he would avoid the expense of the benefits required by the labor agreement (Tr. 9-10). Both practices were forbidden by the labor agreement; possible penalties for violation of the provisions prohibiting those practices included fines and suspension from the labor agreement which would allow the union to strike (Tr. 7-8, 46-48).

To disguise the contracting by KJS, Schwartzbaum caused the vice-president of the firm, Murray L. Bittman, to open a special bank account known as the M.L.B. account, to be used to pay the contractors (Tr. 11). Money was channeled into this account through firm checks payable to Bittman (Tr. 12). Through this procedure no payments to contractors would appear on the KJS firm records in the event of an inspection by union representatives (Tr. 11-12). Bittman was cautious in distributing fur skins to contractors and arranging deliveries from contractors in order to minimize interception by union representatives in the fur district (Tr. 10-11).

Payments to contractors by KJS through the M.L.B. account increased substantially after the beginning of the practice of 1968 (Tr. 13-18). By 1970, 25 to 50 percent of the garments sold by the firm were manufactured by contractors (Tr. 19).

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* The collective labor agreements for 1965-69 and 1969-72 were introduced as GX 1 and 2, respectively.

2. Testimony of Jack Glasser.

Jack Glasser was employed as one of several labor adjustors by the Associated Fur Manufacturers, Inc. (Tr. 38). He was assigned to certain member firms of the Association to investigate, together with a business agent of the union, any alleged violation of the collective labor agreement against those firms, and Schwartzbaum's firm was one of the companies assigned to Glasser (Tr. 49). At the trial Glasser testified for the Government under a grant of immunity (Tr. 36).

Glasser testified that around May 1968 he received a telephone call from Schwartzbaum requesting that he come to the KJS office (Tr. 52). When Glasser arrived, Schwartzbaum showed him into a private office and closed the door (Tr. 53). Schwartzbaum told Glasser that he was importing garments and using contractors and that he did not want any "headaches" from the union (Tr. 53). Glasser replied that he would have to let him know if he could get permission (Tr. 54). A day or so later Glasser met Charles Hoff, the assistant manager of the union (Tr. 63). Glasser had previously funnelled payoffs to Hoff from other fur manufacturers seeking safety from union prosecution for contracting violations (Tr. 63-66). Glasser told Hoff that Schwartzbaum also wanted to give out contracting as well as to import or job garments (Tr. 63). Hoff told Glasser that it would be okay (Tr. 63, 66). Shortly thereafter Glasser again met Schwartzbaum in the private office at KJS and told him, "Jack, I have the okay from Charlie Hoff" (Tr. 66).*

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* The cross-examination and redirect examination of Glasser about this second 1968 meeting with Schwartzbaum is discussed at pages 10-11, *infra*.

Glasser and Schwartzbaum then discussed how much Schwartzbaum would pay. Schwartzbaum proposed $900 a year in three $300 installments (Tr. 67), and he took $300 from his pocket and gave it to Glasser (Tr. 68). A few days later Glasser met Hoff, gave him $150 and said one word, "Schwartzbaum" (Tr. 69). Schwartzbaum made the second 1968 payment to Glasser in September or October and the third "around Christmas week" (Tr. 69-71). Each time Schwartzbaum called Glasser to his office and gave him $300, and Glasser then gave half of each payment to Hoff identifying Schwartzbaum as the source of the money. (Tr. 69-71).

Payments from Schwartzbaum in 1969 followed the same pattern as 1968. Schwartzbaum paid Glasser $300 on three occasions: the first in June or July (Tr. 71), the second in September or October (Tr. 72), and the third "Christmas week" (Tr. 73). Each time Glasser gave half of the money to Hoff identifying Schwartzbaum as the source (Tr. 72-73). The three 1969 payments were the basis for the charges against Schwartzbaum in counts 9, 10 and 11 of the indictment.

At the trial Glasser was uncertain if Schwartzbaum made any payment in 1970 (Tr. 73-74). Glasser had become ill in July 1970 and had been hospitalized for approximately two weeks (Tr. 73-74). He never returned to his job as a labor adjustor after his hospitalization, and his employment by the Associated Fur Manufacturers, Inc. ended in September 1970 (Tr. 74-75). Count 12 of the indictment, dismissed with the Government's consent, had charged one payment by Schwartzbaum in 1970.

In addition to Hoff, Glasser also testified that he relayed money from Schwartzbaum to a second union official, Harry Jaffee (Tr. 76). Jaffee was the union business agent who, together with Glasser, investigated complaints

of labor agreement violations at a number of fur manufacturing firms including KJS (Tr. 48-49). Glasser testified that on one occasion, and possibly more, Schwartzbaum handed him money to give to Jaffee to keep Jaffee quiet about contracting violations by KJS; Glasser gave the money to Jaffee telling him that the money came from Schwartzbaum (Tr. 76-78).

3. Other Evidence.

The preceding indictment, 73 Cr. 257, was filed on March 27, 1973, and contained four counts charging four payments by Schwartzbaum totaling $600 to an officer of the Furrier's Joint Council identical to counts nine through twelve of the present indictment. Schwartzbaum pleaded not guilty to those counts in the earlier indictment on April 2, 1973.

At that time the Chase Manhattan Bank had loans outstanding to Schwartzbaum's firm totaling approximately $400,000 (Tr. 309). The Chase officer responsible for the Schwartzbaum account was Albert Chambers (Tr. 308). Newspaper articles about the earlier indictment had appeared in the local papers, and on the day of the arraignment Schwartzbaum telephoned Chambers and asked him to come to the KJS offices to discuss the articles so that Chambers could get all the facts (Tr. 310). Chambers testified as a Government witness.

When they met on April 3, 1973, Schwartzbaum told Chambers that he had paid $600 to the union official (Tr. 311, 314, 345, 348-49). Schwartzbaum continued that he did not understand the reason for the indictment because of the small amounts involved; he said he believed that the Government's principle targets were the union officials and the larger payers (Tr. 314). Schwartzbaum also explained to Chambers that two manufacturers, who had

made larger payments, had received immunity from the Government and would testify against the union officials (Tr. 315). Schwartzbaum emphasized that the charges against him involved payments totaling only $600 and would have no adverse effect on his company, whatever the outcome might be (Tr. 311, 314). After the meeting, Chambers returned to his office and dictated a file memorandum about what Schwartzbaum had told him (Tr. 311). Chambers was concerned about the criminal activity Schwartzbaum had admitted to him, but because the amount involved was small—$600—he agreed with Schwartzbaum that the indictment would have no serious impact on the status of the company (Tr. 349-50).*

When the Grand Jury indicted Schwartzbaum for making the payments it also indicted Hoff for receiving them. The second union official who Glasser said received money from Schwartzbaum through him was not indicted, however, and that union official, Jaffee, testified for the Government under a grant of testimonial immunity (Tr. 255-57). Jaffee confirmed that he had received moneys from Glasser, which Glasser said came from Schwartzbaum, to look the other way about evidence of contracting by KJS (Tr. 267-68, 271, 303).

Finally, no sanctions were imposed against KJS for contracting from 1968 when Glasser testified that Schwartzbaum began to make the payments until Glasser left the industry in July 1970, although during that period

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* Chamber's memorandum incorrectly stated that Schwartzbaum on April 2, 1973, had testified before the grand jury, and was released on his own recognizance pending trial (Tr. 321-22). Instead Schwartzbaum on April 2, 1973, appeared in court, pleaded not guilty to the charges in the indictment returned by the grand jury, and was released on his own recognizance pending trial.

KJS paid contractors more than $150,000 for the work sent to them (Tr. 15-19). Nor was any sanction directed specifically against KJS for importing. The only labor difficulty experienced by KJS during that period for either importing or contracting was a two-day general strike in 1969 directed against numerous firms, for which KJS had to pay its employees about $400 in lost wages (Tr. 20-21, 78-79). In September 1970, however, almost immediately after Glasser left the industry and Schwartzbaum's conduit to Hoff was broken, the union pressed a contracting complaint against KJS and the firm was fined $3,500 (Tr. 19-20, 28-30).

B. The Defense Case.

Schwartzbaum did not testify. His only witness was his wife, Ruth. She testified that Schwartzbaum was in Florida during "Christmas week" in 1968 and 1969 (Tr. 374, 376).

ARGUMENT

POINT I

The District Court correctly denied Schwartzbaum's first new trial motion.

A. Prior Proceedings.

On direct examination Glasser testified that he had told Schwartzbaum during their second meeting in 1968 that Hoff had approved contracting for KJS:

> "Q. What was the last thing that Mr. Hoff said in your first meeting with him concerning Mr. Schwartzbaum? A. 'It's okay.'

> Q. What did you do after that? A. A day or so later I went up to Mr. Schwartzbaum and I said to him, 'Jack, I have the okay from Charlie Hoff'—" (Tr. 66).

On cross-examination Glasser expressed some uncertainty as to whether he had specifically mentioned Hoff's name to Schwartzbaum at that meeting:

> "Q. Mr. Glasser, you testified yesterday that you actually told Mr. Schwartzbaum the name of the union official who gave the okay. A. I don't know if I did tell it to him. I don't know.
>
> * * * *
>
> Q. And today you are not even sure as to whether or not you had ever mentioned him? A. To Mr. Schwartzbaum specifically, Mr. Hoff?
>
> Q. Yes. A. No, I am not sure that I did.
>
> Q. And it could be that you didn't tell it to him? A. Possibly that I didn't tell it to him, that it was Mr. Hoff, yes." (Tr. 191-93).

Glasser also testified during cross-examination that he had not met during the week preceding the *Schwartzbaum* trial with the two Assistant United States Attorneys conducting the trial, V. Thomas Fryman, Jr. and John C. Sabetta, to prepare for his testimony at the trial and that he had not told them before the trial that he informed Schwartzbaum at the second meeting of Hoff's approval (Tr. 194-95, 200-01).

Glasser had flown to New York from his home in Florida the morning the *Schwartzbaum* trial commenced (Tr. 198). On redirect examination Glasser stated that he had made a previous trip to New York from his home in Florida about a week earlier and that he had stayed in New York for four or five days during that trip

(Tr. 220). On the day he returned to Florida he met with Assistant United States Attorneys Fryman and Sabetta for several hours and discussed a number of subjects (Tr. 221). With respect to Schwartzbaum, Glasser stated that "outside of the fact that he was not going to come up because of illness, I don't recall any discussion on Mr. Schwartzbaum at that particular time." (Tr. 222). At that point the District Court permitted the Government to show Government Exhibit 3511 for identification to Glasser for the purpose of refreshing his recollection about his prior discussion with the Government attorneys concerning Schwartzbaum (Tr. 228). Glasser then testified that Government Exhibit 3511 refreshed his recollection, and he continued that with respect to the second 1968 meeting with Schwartzbaum:

> "I came back to Mr. Schwartzbaum and I said, I have had a conversation with Mr. Hoff. He has said okay, you can go ahead and do it." (Tr. 229).

Copies of Government Exhibit 3511 had been given to Schwartzbaum's trial counsel, William Esbitt, Esq., and the District Court during the week preceding the trial (App. 27, 42). The exhibit was a two page typewritten memorandum to the files from Assistant United States Attorney Fryman dated March 26, 1974, concerning an interview he and Assistant United States Attorney Sabetta had with Glasser that morning (App. 21-22). The memorandum stated in part:

> "After meeting Hoff, Glasser went back to Schwartzbaum's shop. Again Schwartzbaum took Glasser into the small private office and shut the door. Glasser told Schwartzbaum that Hoff said okay." (App. 21).

During the defense case, Mr. Esbitt, after he completed his examination of Schwartzbaum's wife, requested

a conference in chambers (Tr. 377). At that point he announced his intention to call Assistant United States Attorney Fryman as his next witness (Tr. 378). He explained that he had objected to the use of Government Exhibit 3511 to refresh Glasser's recollection and continued:

> "But that is past. That in itself I don't think is too significant, but I tell you what is most unusual about it, Judge. There had never been a memorandum in this file yet of an interview with a witness except this one. Not one. Mr. Fryman interviewed witnesses and never dictated a memorandum like this. He interviewed Mr. Bittman and never dictated a memorandum. He interviewed Mr. Chambers and never dictated a memorandum.
>
> Why is this significant? Mr. Sabetta interviewed the witness, Mr. Glasser, never dictated a memorandum.
>
> . . . .
>
> Why? Why? Why? I want the jury to know. I have a right to question him." (Tr. 379-80).

In response to the District Court's question about his offer concerning the proposed testimony, Mr. Esbitt stated:

> "I want to question Mr. Fryman about that meeting with him, whether he took notes, when he dictated the memorandum, and so on." (Tr. 386-87).

At another point in the conference Mr. Esbitt emphasized Glasser's denial during cross-examination that he had previously told the Government attorneys about informing

Schwartzbaum of Hoff's approval during the second meeting and stated:

> "I want to find out who is telling the truth, Mr. Glasser or Mr. Fryman." (Tr. 380-81).

Mr. Esbitt rejected the Government's offer of a stipulation concerning the earlier interview (Tr. 380). The District Court denied his request to call Assistant United States Attorney Fryman as a witness; Mr. Esbitt then announced that the defense rested (Tr. 387).

The use of Government Exhibit 3511 to refresh Glasser's recollection and the District Court's refusal to allow Schwartzbaum to call Assistant United States Attorney Fryman as a defense witness were thereafter the grounds for Schwartzbaum's first new trial motion. In the papers in support of his first new trial motion Schwartzbaum made one new argument in addition to the arguments made to the District Court during the trial: he claimed that the Government had committed substantial error when it failed to disclose "to the Court and jury" that Glasser's testimony was untruthful when he stated on cross-examination that he had not previously told Assistant United States Attorneys Fryman and Sabetta about informing Schwartzbaum of Hoff's approval during the second meeting in 1968 (App. 20).

In response to Schwartzbaum's first new trial motion, the Government submitted affidavits by Assistant United States Attorneys Fryman and Sabetta. The Fryman affidavit described the circumstances leading up to the interview with Glasser on March 26, 1974, and then described what had occurred during the interview concerning the second 1968 meeting with Schwartzbaum:

> "With respect to his second meeting with Mr. Schwartzbaum, I asked Mr. Glasser what he had

said. He replied that he had told Mr. Schwartzbaum that Mr. Hoff said okay. I was aware that this aspect of that second meeting had not been brought out in Mr. Glasser's prior testimony, and I asked him if he was certain that he had mentioned Mr. Hoff's name to Mr. Schwartzbaum at that meeting. Mr. Glasser again replied that he had told Mr. Schwartzbaum that Hoff said okay. He repeated this answer to a further question by Mr. Sabetta about what he had said in that second meeting with Mr. Schwartzbaum." (App. 25-26).

The affidavit also described the preparation of Government Exhibit 3511:

> "Neither Mr. Sabetta nor I made any notes during this meeting with Mr. Glasser. During the evening of Tuesday, March 26, I typed a draft of a memorandum concerning our meeting with Mr. Glasser. A copy of the draft which I typed is attached hereto as Exhibit 1. The following morning I gave the draft to Mr. Sabetta to review. Later that day Mr. Sabetta returned the draft to me and stated that it accurately reflected his recollection of our meeting with Mr. Glasser. I then had the draft retyped, and a copy of the final memorandum was marked as GX 3511 and given to Mr. Schwartzbaum's counsel on Thursday, March 28, 1974." (App. 26-27).

Assistant United States Attorney Sabetta in his affidavit stated that he and Assistant United States Attorney Fryman had met with Glasser on March 26, 1974; that during that interview Glasser said that "he told defendant Schwartzbaum that Mr. Charles Hoff had agreed to the arrangement"; and that he had reviewed the Fryman affidavit and the statements in it were in accord with his recollection of the events described in it (App. 31-32).

The District Court denied Schwartzbaum's first new trial motion in a Memorandum and Order dated May 13, 1974, stating that "the Court finds these serious charges of subterfuge or fabrication against the government totally without foundation." (App. 39).

B. Use of Government Exhibit 3511 to Refresh Glasser's Recollection Was Proper.

Schwartzbaum's Brief (p. 44) recognizes that "the general principle is that any writing may be used to stimulate and revive the recollection of a witness, even if that writing was not made by the witness himself." This general principle should not be followed here because, he implies, the Assistant United States Attorney prosecuting the case fabricated the statement in Government Exhibit 3511—"Glasser told Schwartzbaum that Hoff said okay"—in order to suborn perjury by Glasser at the trial.

The District Court found that the affidavits submitted by the Government in opposition to Schwartzbaum's first new trial motion "amply describe the circumstances surrounding the preparation of the document" and rejected this charge by Schwartzbaum as "totally without foundation" (App. 39).* Schwartzbaum has offered no evidence to support his charge, nor did he seek a hearing before the

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* Government Exhibit 3511 was drafted the same day as the Glasser interview and a copy was given to the Court and Schwartzbaum's counsel a week before the trial. The document, therefore, bears little resemblance to the hypothetical note, described in Schwartzbaum's Brief (p. 46), written by a prosecutor during the course of trial and handed to the witness to refresh his recollection. Schwartzbaum rightly suggests that in such circumstances a district judge might depart from the general principle recognized in his Brief.

District Judge, either during the trial or at the time of his first new trial motion, for the purpose of examining the Government attorneys concerning the preparation of the document.

There is absolutely no basis for Schwartzbaum to challenge in this Court the District Court's finding. There is therefore absolutely no reason why this Court should question the exercise of discretion by the District Court allowing use of Government Exhibit 3511 to refresh Glasser's recollection in accordance with the "general principle" recognized in Schwartzbaum's brief.*

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* The discussion in Schwartzbaum's Brief of the importance of Glasser's testimony that he specifically mentioned Hoff's name to Schwartzbaum during the second meeting in 1968 shows a misunderstanding of the proof necessary to establish the crime in the indictment. Schwartzbaum's trial counsel asked the District Court to charge the jury that the Government must establish that Schwartzbaum knew that Hoff was to be the recipient of the payments (Tr. 390-91). The District Court rejected the charge proposed by Schwartzbaum and instead charged the jury that it could find that Schwartzbaum acted "knowingly and wilfully" if it found that he gave moneys to Glasser "expecting or contemplating that Jack Glasser would transmit at least a portion of those moneys to one or more union officials or employees." (Tr. 427). Schwartzbaum does not question the charge here, and there is ample authority to support it. *E.g., United States* v. *Pecora*, 484 F.2d 1289 (3d Cir. 1973); *United States* v. *Lanni*, 466 F.2d 1102, 1107 n.17 (3d Cir. 1972). He continues to state in his Brief, however, that the Government had to establish "that Schwartzbaum knew such payments were being made to Hoff in his behalf" (p. 7).

The jury did not ask to have reread any of Glasser's testimony about the second meeting with Schwartzbaum. The testimony that the jury wanted to hear again was "Mr. Chambers testimony admitting that Mr. Schwartzbaum gave money" (Tr. 438).

C. Refusal to Allow Schwartzbaum to Call the Government Prosecutor as a Defense Witness Was Proper.

The District Court in denying Schwartzbaum's first new trial motion stated that Schwartzbaum's counsel by cross-examination or the use of Government Exhibit 3511 itself could have established the contradiction between Glasser's testimony and the terms of the memorandum and that there was no need to put the prosecutor on the stand to establish the contradiction (App. 41). The District Court continued that the "issues raised pertaining to the preparation of the document and the circumstances surrounding the questions and answers included therein were, in this Court's opinion, collateral to the central issue of credibility and far from vital to the defense." (App. 41).

Schwartzbaum now argues in his Brief (p. 48) that the analysis by the District Court was wrong because "the jury was aware" that Government Exhibit 3511 was a memorandum prepared by Government counsel; that by using the memorandum to refresh Glasser's recollection "the prestige and credibility of Government counsel were placed in the balance"; and that the jury not only had Glasser's claim on redirect examination that he had previously told Schwartzbaum about Hoff's approval at the second 1968 meeting "but they knew that Government counsel concurred in that assertion." For those reasons, Schwartzbaum now argues, it was necessary to examine Government trial counsel to establish "what had occurred and what was said during the conference with the prosecutor."

In making this argument Schwartzbaum now attempts to pull himself up by his own bootstraps because only his trial counsel—and not Government counsel—identified

Government Exhibit 3511 to the jury as a Government memorandum.* The questions to Glasser by the Government attorney did not describe Government Exhibit 3511, and the document was not mentioned in the Government's summation. It was Schwartzbaum's trial counsel in arguing that the document should not be used to refresh Glasser's recollection who stated in front of the jury that "it is a document prepared by Mr. Fryman" (Tr. 223) and who further referred in his summation to the "paper prepared by Mr. Fryman" (Summ. 27). The complete disingenuousness of Schwartzbaum's argument here is shown by its inconsistency with his argument made to the District Court, not repeated here, that the Government prosecutor was under a duty to inform the jury that Glasser had indeed stated in a prior interview that he informed Schwartzbaum at the second meeting in 1968 of Hoff's approval.

It is of course easy to understand why Schwartzbaum's experienced and wily trial counsel wanted to force the Government attorney trying the case, immediately prior to summations, to abandon his role as an advocate and submit to hostile cross-examination concerning a matter totally unrelated to the charges against Schwartzbaum. His predicament was serious: the Government's evidence was strong; his client had chosen not to testify; and his only witness, Schwartzbaum's wife, had realistically failed to contradict any part of the Government's case.**

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* Other 3500 exhibits were identified as notes made by Glasser (Tr. 146-47).

** Glasser testified that the third payment in 1968 occurred "around Christmas week" (Tr. 70) and that in 1969 "there was one payment Christmas week" (Tr. 73). Mrs. Schwartzbaum's testimony that her husband left New York for Florida on December 20 or 21 of both years (Tr. 375-76) does not present any real inconsistency with Glasser's testimony.

Courts have consistently recognized, however, that a defense counsel must establish an extremely compelling and legitimate need before he will be allowed to force Government counsel to abandon his role as an advocate and submit to hostile cross-examination. *E.g.*, *Murphy* v. *United States*, 481 F.2d 57 (8th Cir. 1973); *United States* v. *Newman*, 476 F.2d 733 (3d Cir. 1973); *Gajewski* v. *United States*, 321 F.2d 261, 268-69 (8th Cir. 1963), *cert. denied*, 375 U.S. 968 (1964); *United States* v. *Maloney*, 241 F. Supp. 49 (W.D. Pa. 1965). Under the circumstances here, the District Court properly refused to allow Schwartzbaum to call the Government prosecutor as a defense witness.

POINT II

The District Court correctly denied Schwartzbaum's second and third new trial motions.

A. Prior Proceedings.

At the *Stofsky* trial, Glasser's 1972 federal income tax return was introduced into evidence on February 14, 1974, and his 1967 and 1970 federal income tax returns were introduced into evidence on February 20, 1974 (App. 78). Those returns showed substantial interest income from The East New York Savings Bank, The Greenwich Savings Bank and the Emigrant Savings Bank. While Schwartzbaum's counsel had access to those returns from the time that they were received in evidence at the *Stofsky* trial, he did not serve trial subpoenas seeking production of records from any of those three banks at the *Schwartzbaum* trial which commenced on April 1, 1974 (App. 78).

At the *Schwartzbaum* trial, there was no testimony by Glasser about his savings.* Government counsel asked Glasser at the beginning of his direct examination if he

* Schwartzbaum's Brief (p. 7) incorrectly suggests that there was such testimony.

had any savings at the time he left the fur industry in 1970, and the Court sustained an objection by Schwartzbaum's counsel (Tr. 39). Schwartzbaum's counsel had objected to the preceding question concerning Glasser's sources of income since he left the industry as "irrelevant" because such income "has nothing to do with this trial"; that objection was also sustained (Tr. 39). In response to questions on direct examination about other firms that paid money to Glasser to be transmitted to union officials, Glasser stated that there were "five firms all together" (Tr. 80). He continued that he received approximately $14,000 from those five manufacturers and KJS during 1967-69, of which he retained approximately $5,000 (App. 49-50). He also testified that he had committed five "crimes" at the time he received immunity from the Government (Tr. 84). The Court sustained an objection to further questions by Schwartzbaum's counsel about "crimes" committed by Glasser on the ground that the questions called for a legal conclusion by the witness (Tr. 90).

After the *Schwartzbaum* verdict, the *Stofsky* defendants moved for a new trial on the ground of newly discovered evidence, specifically bank records from The East New York Savings Bank, The Greenwich Savings Bank and the Emigrant Savings Bank, showing the following deposits in Glasser's savings accounts during the years 1967-70 (App. 51-75, 219-20; Addendum):

	1967	1968	1969	1970	Total
Cash Deposits	$11,151.05	10,950.00	22,500.00	9,650.00	54,251.05 *
Check Deposits	$ 1,851.10	942.27	1,318.26	163.80	4,275.43
Cash or Check Deposits	$ 50.00	3,000.00	82.57		3,132.57
	$13,052.15	14,892.27	23,900.83	9,813.80	61,659.05

* The *Stofsky* defendants calculated the cash deposits during this period to be $56,701.05.

Thereafter Schwartzbaum used these same bank records as the basis for his second new trial motion. He claimed that the cash deposits exceeding $50,000 in this four-year period established the falsity of Glasser's testimony that he had given to union officials approximately $9,000 of the $14,000 given to him during 1967-69 by the six manufacturers he had identified:

> "We submit that the source of these cash deposits can be explained only by concluding that Glasser perjured himself when he testified that he gave any of the monies to one or more of the union officials. Rather, there were much larger payments and/or payments from many additional sources and no portion of any payments went to anyone other than Glasser himself." (App. 47).

Other arguments by the *Stofsky* defendants concerning alleged false testimony by Glasser about his savings and a purported *Brady* violation by the Government in failing to turn over Glasser's income tax returns in advance of trial were not repeated by Schwartzbaum, presumably because at his trial Glasser had given no testimony concerning his savings and his counsel had had access to Glasser's tax returns before the trial.

In response the Government submitted affidavits of officials of The East New York Savings Bank stating that part of the records of that bank on which Schwartzbaum's motion was based were available on February 14, 1974, and the remainder prior to March 6, 1974 (App. 90-96). The Government also submitted affidavits of officials of The Greenwich Savings Bank and the Emigrant Savings Bank stating that the records of those banks on which Schwartzbaum's motion was based were available on two to four days' notice if he had served a trial subpoena for them (App. 97-100).

An affidavit by the Government attorney also stated that Glasser in further interviews in May 1974 had informed the Government that numerous other fur manufacturers, in addition to the six manufacturers identified at the *Schwartzbaum* trial, had paid him moneys, and in each such instance he passed on a substantial portion of the money to one or more union officials (App. 80-81). The affidavit continued that in those interviews Glasser also acknowledged that his statement at the *Schwartzbaum* trial that he never received cash Christmas gifts from fur manufacturers was incorrect as well as statements that he had never gambled or been to the race track (App. 82-83). Further details concerning the payments from the other manufacturers were set forth in additional papers, not served on Schwartzbaum's counsel, which the Government asked the Court to place under seal.

Schwartzbaum's counsel then submitted a letter to the Court dated June 3, 1974, in response to the Government's papers. In that letter he asked that a copy of the additional papers submitted by the Government be made available to him, argued that the disclosures in the Government's papers "strike at the very heart of the Government's proof", and suggested "that a hearing be held to determine whether in fact Mr. Glasser had perpetrated a fraud upon the Government by failing to disclose during their investigations the information which is contained in Mr. Fryman's additional affidavit" in connection with an application for reconsideration of his first motion for a new trial "in the interests of justice" (App. 103-05).

At the sentencing on June 4, 1974, the District Court announced that it was denying Schwartzbaum's second motion for a new trial (App. 134-35). In an Endorsement Order dated June 24, 1974, the District Court stated that "in this Court's view, the defendant has failed

to satisfy the threshold requirement of demonstrating that the purported newly discovered evidence could not have been with due diligence discovered either before the trial or at the latest at the trial." (App. 196). The Court said that further reasons for the denial were substantially those contained in the Memorandum Opinion denying the similar motion in *Stofsky*. In the *Stofsky* opinion the Court found that there had been no prosecutorial misconduct so that the applicable test for evaluating the new evidence, in the event of due diligence by the defendant, was whether it would "probably produce a different verdict" (App. 124). The District Court rejected the argument that the bank records established that Glasser committed perjury when he testified that he gave part of the money he received from the six manufacturers he previously identified to the union officials:

> "It is far too wide a leap in reason to assert that just because Glasser accumulated $57,000 in cash during the critical time period that, *a fortiori*, a jury hearing these facts could only conclude that he kept the whole of the mere $11,000 he said he gave the defendants. On the contrary, the figures alone are so incongruous as to lead to no conclusion at all." (App. 125).

The Court continued that even the defendants noted in their papers that the bank records would indicate to a jury that there were other or larger payments or both—indeed, the Court continued, given the explanation Glasser would likely give at another trial further implicating the union officials, it was unlikely that they would even use the bank records at another trial (App. 126). Finding that the new evidence "would not have changed the quantum of the impeaching effect" and taking into account the "totally independent evidence to support Glasser's story which would have remained unsullied", the

District Court stated that it could not conclude that in light of the new evidence the jury would probably have reached a different verdict at the completed trial or at a retrial (App. 129-30).

Following receipt of the papers in support of the original new trial motion in *Stofsky*, the Government commenced an investigation of the allegations in those papers as well as a broader investigation of the fur manufacturing industry. In addition to the May interviews of Glasser discussed above, grand jury subpoenas were issued on May 9 and 10, 1974, for additional finacial records of Glasser including subpoenas for records from Chemical Bank and the Dollar Savings Bank, as well as records from The East New York Savings Bank, The Greenwich Savings Bank and the Emigrant Savings Bank which covered a broader time period than had been specified in the earlier subpoenas issued by the *Stofsky* defendants (App. 203, 230-34). Production of the records specified the Government subpoenas was incomplete by the return dates fixed for the *Stofsky* new trial motion and the second *Schwartzbaum* new trial motion, and the documents which had been produced by that time did not contradict any statements in the papers submitted by the Government in response to the motions (App. 204). After consultation with the Chief Assistant United States Attorney, it was decided not to make a piece-meal production at that time of the incomplete financial records, but rather to pursue the investigation, obtain all the records available and then produce to defense counsel any documents which could even arguably provide any support for their position (App. 204-05). During June through August 1974, the Government attempted to obtain all the remaining financial records which were available, particularly records from Chemical Bank (App. 205-06, 236-40). All of the remaining Chemical Bank documents

were finally produced on August 16, 1974 (App. 205, 240). Following receipt and analysis of those documents, the Government again interviewed Glasser in Miami, Florida, on August 23, 1974. Glasser's statements in that interview were inconsistent with his statements in the May 1974 interview in two respects: first, he said that he had begun receiving payoffs from manufacturers in 1962, while he had earlier said that the payoffs had begun in 1964; and second, he estimated his wife's inheritance at $30,000 to $40,000 in value and could not specify what portion of that was included in his savings accounts, while he had estimated in the May interviews that $40,000 to $50,000 of the moneys in his savings accounts had come from his wife's inheritance (App. 206). By a letter dated September 3, 1974,* the Government informed defendants' counsel in *Stofsky* and *Schwartzbaum* of those inconsistencies and further stated that all of Glasser's financial records obtained by the Government in connection with the Government's continuing investigation of the fur industry were available for their inspection (App. 155-56, 207). The Government then entered into stipulations with Schwartzbaum and the *Stofsky* defendants staying the pending appeals to allow further new trial motions in the District Court (App. 176-78).

In October 1974 Schwartzbaum filed papers in support of his third motion for a new trial. The bank records made available by the Government in September 1974 together with the bank records which were the basis for Schwartzbaum's second motion showed deposits by Glasser during the years 1962-73 totalling $157,688.83.** A

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* Through a mistake in the United States Attorney's office the letter was not mailed until September 11, 1974 (App. 207).

** The financial analysis of these records prepared by Schwartzbaum's accountant was admittedly erroneous (App. 257). The totals used are the Government's which Schwartzbaum's Brief (p. 22) concedes to be correct.

breakdown of the deposits shown by the bank documents produced in response to the various subpoenas is attached hereto as an Addendum. The affidavit submitted in support of Schwartzbaum's third motion stated that Glasser's large deposits "would have provided solid evidence of the defense contention that any monies received by him had been kept by him rather than shared with union representatives." (App. 171). The affidavit further stated that if Schwartzbaum had known at the time of trial that Glasser was receiving payments from many more manufacturers "then Glasser's alleged recollection of conversations with the defendant would have been severely undermined" and further that Schwartzbaum could have forcefully argued "that Glasser's recollection about giving money to Schwartzbaum [*sic*] at all was faulty and that to the extent payments may have been made, the statute of limitations had run." (App. 171-72).

Alternatively, Schwartzbaum requested an evidentiary hearing. The affidavit submitted by Schwartzbaum set forth three reasons for a hearing: (1) to develop "when the Government first knew or had evidence of the fact that Glasser was lying"; (2) to present possible testimony by manufacturers specified by Glasser who would deny giving money to him; and (3) to allow Schwartzbaum to subpoena additional bank records (App. 172-74).

The Government's affidavit in response set forth a detailed account of the investigation pursued by the Government and included as an exhibit the Government's file memorandum of the interview of Glasser on August 23, 1974 (App. 206, 225-27).* The affidavit stated that an evidentiary hearing was not necessary to allow Schwartz-

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* Certain names as well as certain paragraphs concerning matters other than Glasser's finances were redacted from the memorandum (App. 206).

baum to subpoena further bank records because the Government had already obtained all the records available and given them to Schwartzbaum (App. 207-08). As for the value of testimony by other manufacturers at a hearing, the affidavit pointed out that the three manufacturers charged with Schwartzbaum in the indictment had all consistently denied paying Glasser until they pleaded guilty on the eve of trial in March 1974 (App. 208). With respect to Schwartzbaum's knowledge prior to trial of the alleged "newly discovered" bank records, attached to the affidavit as Exhibit 11 was a file memorandum dated August 27, 1974, concerning a telephone conversation between Assistant United States Attorney Sabetta and Elkan Abramowitz, Esq., counsel for the *Stofsky* defendants (App. 208-09, 242-43). That memorandum noted that Mr. Abramowitz had stated that he met with Schwartzbaum's trial counsel, William Esbitt, Esq., prior to the *Schwartzbaum* trial and had told Mr. Esbitt that he had obtained bank records of Glasser's accounts showing large cash deposits from 1967 through 1970 and that those records were available to Mr. Esbitt.

Schwartzbaum then filed further papers, including affidavits by Mr. Esbitt and Mr. Abramowitz. Mr. Esbitt's affidavit stated, "I have *no recollection* of Mr. Abramowitz telling me, either in words or substance, anything about cash deposits to Glasser's account, which he discovered after the trial in his case." (App. 261a) (emphasis added). While Mr. Abramowitz' affidavit minimized his conversation with Mr. Esbitt, he confirmed the substance of it as reported in the file memorandum attached to the Government affidavit: "I told Mr. Esbitt that we had evidence of cash payments to Jack Glasser, which we had discovered after the trial in the *Stofsky* case." (App. 265). Schwartzbaum's further papers also set forth the need to examine Glasser as a new

reason why the Court should grant an evidentiary hearing (App. 251-53).

The District Court denied Schwartzbaum's third new trial motion in an Endorsement Order dated June 5, 1975 (App. 279-81). The Court stated that in its judgment the Glasser deposits "do not at all indicate that no union officials were involved in the scheme." (App. 280). The Court rejected Schwartzbaum's argument that Glasser's testimony concerning him would have been severely undermined because of the indications that many more manufacturers had participated in the scheme. This contention, the Court continued, overlooked the strong corroborative evidence that Schwartzbaum had made the payments, including testimony by a Government witness that he had admitted making them (App. 280). Finally, the Court denied Schwartzbaum's alternative request for an evidentiary hearing noting that the central allegation concerning Glasser's finances was wholly documentary and had been made available to defendant, that the Government's actions in connection with Glasser had been detailed, and that disclosure of the names of the other manufacturers would not serve the public interest (App. 281).

B. Due Diligence By Schwartzbaum Would Have Discovered The Evidence Before Trial.

It is "fundamental that a defendant seeking a new trial under any theory must satisfy the district court that the material asserted to be newly discovered is in fact such and could not with due diligence have been discovered before or, at the latest, at the trial." *United States* v. *Costello*, 255 F.2d 876, 879 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958). *Accord*, *United States* v. *Marquez*, 490 F.2d 1383 (2d Cir. 1974), *aff'g on opinion*

below, 363 F. Supp. 802, 808 (S.D.N.Y. 1973), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *Edwards*, 366 F.2d 853, 874 (2d Cir. 1966), *cert. denied*, 386 U.S. 908, 919 (1967); *Brown* v. *United States*, 333 F.2d 723 (2d Cir. 1964). As Chief Justice Burger has stated, "In short a litigant is not allowed to gain an advantage out of his own slovenly preparation for trial." *Levin* v. *Katzenbach*, 363 F.2d 287, 294 (D.C. Cir. 1966) (dissenting opinion). Here the District Court found that "the defendant has failed to satisfy the threshold requirement of demonstrating that the purported newly discovered evidence could not have been with due diligence discovered either before the trial or at the latest at the trial." (App. 106).

The Supreme Court of the United States has stressed that "it is not the province" of an appellate court "to review orders granting or denying motions for a new trial when such review is sought on the alleged ground that the trial court made erroneous findings of fact" and that "it should never do so where it does not clearly appear that the findings are not supported by any evidence." *United States* v. *Johnson*, 327 U.S. 106, 111-12 (1946). *Accord*, *United States* v. *Rosner*, 516 F.2d 269, 272-73 (2d Cir. 1975); *United States* v. *Kahn*, 472 F.2d 272, 287 (2d Cir.), *cert. denied*, 411 U.S. 982 (1973); *United States* v. *De Sapio*, 456 F.2d 644, 647-48 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972); *United States* v. *Silverman*, 430 F.2d 106, 119-20 (2d Cir. 1970), *cert. denied*, 402 U.S. 953 (1971); *United States* v. *Costello*, 255 F.2d 876, 880 (2d Cir.), *cert. denied*, 357 U.S. 937 (1958).

There was certainly evidence here to support the District Court's finding of lack of due diligence by Schwartzbaum. The existence of the three savings accounts paying substantial interest to Glasser was shown in his income tax returns introduced as defendants' exhibits at the *Stofsky* trial on February 14 and 20, 1974—

more than a month before the start of the *Schwartzbaum* trial—and available to Schwartzbaum's counsel at that time. The affidavits of the officials of all three of the banks show that the records would have been produced on a few days notice if Schwartzbaum's counsel had subpoenaed them. As in *United States* v. *Edwards*, 366 F.2d 853, 873 (2d Cir. 1966), *cert. denied*, 386 U.S. 908, 919 (1967), "there was no satisfactory showing before the trial judge as to reasons why the supposed 'documentary proof' . . . could not have been brought to the Court's attention during trial by the exercise of due diligence." Furthermore, counsel for the *Stofsky* defendants has stated in an affidavit that he specifically informed Schwartzbaum's counsel—prior to the *Schwartzbaum* trial—that he had obtained evidence of cash payments to Glasser which he had discovered after the *Stofsky* trial, and Schwartzbaum's trial counsel has submitted an affidavit where he does not deny that such a statement was made to him, but only that he has "no recollection" of such a statement. On this record, therefore, it must be assumed that Schwartzbaum's counsel was specifically informed prior to the *Schwartzbaum* trial about the evidence of cash payments to Glasser that the *Stofsky* attorneys had obtained. *See United States* v. *On Lee*, 201 F.2d 722, 724 (2d Cir.), *cert. denied*, 345 U.S. 936 (1953).*

Schwartzbaum in his Brief here makes three arguments about why this appellate court should reject the

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* Schwartzbaum's Brief (p. 19) states:

> "Following the instant trial (A. 45), defense counsel became aware of the existence of the bank records which revealed Glasser's cash deposits. (*Compare*: affidavit of William Esbitt, Esq. [A. 261] and affidavit of Elkan Abramowitz, Esq. [A. 264])."

How a comparison of the Esbitt and Abramowitz affidavits leads to the conclusion that defense counsel "became aware" of the bank records after the *Schwartzbaum* trial is unclear.

finding by the District Court of lack of due diligence. First, "the defense was at an even greater disadvantage than counsel in the *Stofsky* case" (p. 33). Second, if the defense should have been alerted to the evidentiary possibility of the bank records, "that conclusion applies, *a fortiori*, to the prosecution" but "there is no inlication [*sic*] whatsoever that the prosecution ever raised the subject with defense counsel" (p. 34). Third, there is no "conceivable reason" why Schwartzbaum's counsel would not have used the evidence if he had realized it existed (p. 34).

As for the first argument, the fundamental difference between the *Stofsky* defendants and Schwartzbaum was time—they had days to gather the evidence and he had weeks. The District Court's refusal to require that they "turn every key at precisely the right moment" (App. 119) was certainly not applicable to Schwartzbaum whose trial did not begin until April 1, 1974. Furthermore, statements made in Schwartzbaum's Brief in support of this first argument incorrectly state the events that occurred. Speaking of the *Stofsky* trial, Schwartzbaum's Brief states that "[i]t appeared as though both defense counsel and the government in the prior trial had had access to the bank records, and that Glasser had been interrogated to the fullest extent imaginable, all to no avail." (p. 34). The Brief continues that Schwartzbaum's attorney cannot be faulted for not following the same "path". It is hard to understand how it "appeared" that Glasser had been "interrogated" by the use of the bank records and that the "path" was unsuccessfully pursued since the bank records were not mentioned by any counsel at the *Stofsky* trial.*

* The statement in Schwartzbaum's Brief (p. 18) that bank records subpoenaed by the *Stofsky* defendants "led" to the disclosure that Glasser had assets exceeding $100,000 is wrong. Glasser testified in *Stofsky* about his assets in reponse to cross-examination concerning entries in his income tax returns (App. 223).

The second argument made in Schwartzbaum's Brief would nullify the due diligence requirement. If the Government has an equal obligation to investigate leads favorable to the defendant and then turn the results of its investigation over to defendant's counsel, diligence from the defendant's counsel is no longer necessary since the Government is required to do his job for him. This notion has recently been rejected by this Court. *United States* v. *Rosner*, 516 F.2d 269, 280 n.5 (2d Cir. 1975). *Accord*, *Levin* v. *Katzenbach*, 363 F.2d 287, 291 (D.C. Cir. 1966).

Finally, as for Schwartzbaum's third argument, there are "conceivable" reasons why Schwatrzbaum's counsel would not have pursued the bank records prior to trial. One possibility is the desire to have a ground for a new trial motion in the event his client was convicted. A valid tactical reason is another possibility: for example, Schwartzbaum may not have wanted the jury to know how common it was for fur manufacturers to make pay-offs to union leaders.*

In sum, Schwartzbaum's appeal from the District Court's orders denying his second and third new trial motions should be denied because there is evidence supporting the District Court's finding that the evidence could have been discovered by Schwartzbaum prior to or at trial through the exercise of due diligence.

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* The objection by Schwartzbaum's counsel to any questions about the amount of Glasser's savings and his failure to use in cross-examination the probate records which the District Court concluded "established that the inheritance story was not true" (App. 128-29) suggest this tactical reason as the explanation for his failure to pursue the bank records prior to trial.

C. There Was No Need For A Hearing About Suppression Of Evidence.

On his second new trial motion Schwartzbaum did not ask for a hearing with respect to possible Government knowledge at the time of trial of payoffs to Glasser from additional fur manufacturers. On his third new trial motion, however, Schwartzbaum did ask for such a hearing, and his Brief here (pp. 28-29) argues that the District Court erred in finding no such prosecutorial misconduct without a hearing. In contrast, the *Stofsky* defendants have never requested such a hearing.

The Government's affidavit in response to Schwartzbaum's second new trial motion described in detail the interviews of Glasser by Government counsel in May 1974. The affidavit stated that Glasser "for the first time during these meetings" informed Government counsel of his other sources of income including illegal payments from other manufacturers (App. 80). Schwartzbaum's original papers in support of his third new trial motion asked for a hearing where he could challenge that statement. He argued that the Government had kept the facts "obscure by design" pointing to two specifics: first, the Government had indicated that Glasser received payments as early as 1962 but the financial information provided to Schwartzbaum had indicated that the first payments were in 1964; and second, that the Government must have received more detailed information from Glasser than revealed in the September 3, 1974, letter to defense counsel (App. 172-73). In response the Government pointed out that the bank records made available to him showed deposits by Glasser in 1962 (App. 223) and provided a copy of the Government's file memorandum of the further interview with Glasser on August 23, 1974 (App. 225-28). Schwartzbaum then in his reply papers set forth a new reason why he needed a hearing in order to cross-examine

Government counsel. He argued that the Government's "tactical decision" not to make available partial finacial records of Glasser during the pendency of his second new trial motion showed "the Government's demonstrated willingness to conceal facts as well as its demonstrated inability to arrive at the true facts" (App. 253). This is the reason for the need for a hearing to examine Government counsel about the timing of Glasser's disclosures set forth in Schwartzbaum's Brief here (p. 38).

Does the Government's conduct in this case then demonstrate a "willingness to conceal facts" as well as an "inability to arrive at the true facts" which would warrant an inference that the statements in the Government's affidavit about the timing of Glasser's disclosures were false and justify a hearing to allow cross-examination of Government counsel? It is undisputed that the Government after receipt of the motion papers from the *Stofsky* defendants based on the records of the three savings banks launched an investigation of Glasser's finances that included subpoenaing records covering a broader time period from those institutions as well as records from other banks and brokerage houses (App. 155, 203, 230-34). It is undisputed that the Government continued to press for the production of additional financial records after the District Court had denied Schwartzbaum's second new trial motion (App. 205-06, 236-40). It is undisputed that after receipt of all of the available financial records the Government conducted a further examination of Glasser in Miami, Florida on August 23, 1974 (App. 206, 225-28). And it is undisputed that the Government, *sua sponte*, notified defense counsel that all of the documents it had obtained were available for their review and informed them about the subsequent interview with Glasser (App.

155-56). The Government submits that these undisputed actions by the Government refute Schwartzbaum's charges of a "willingness to conceal facts" and an "inability to arrive at the true facts" and instead show a consistent and persistent effort to get all the relevant evidence and make it available.*

This is not a case like *United States* v. *Keough*, 391 F.2d 138, 149 (2d Cir. 1968), relied on by Schwartzbaum, where unquestionably a report possibly useful to the defense at trial had been present in the Government's file but not produced, and this Court ruled that a hearing was necessary to determine the Government's "motivation" for the failure to turn it over. Here, Schwartzbaum's entire claim that the Government had any information at trial concerning Glasser's payments from other manufacturers is founded on an erroneous innuendo based on subsequent Government conduct. Under such circumstances the District Court properly found, on the record before it

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* Schwartzbaum also states in his Brief (p. 38) that the Government's conduct "strengthens our contention that the previously hidden memorandum of the Government's interview with Glasser should be disclosed to the defense." For the reasons set forth above, the Government submits that his contention is not strengthened. An examination of the Additional Affidavit submitted by the Government in opposition to Schwartzbaum's second new trial motion will show that the substance of it has already been disclosed and that the District Court was correct in finding that disclosure of the remainder would not be in the public interest. Schwartzbaum also complains in his Brief that the copy of page 4 of the memorandum of the August 23, 1974, interview with Glasser made available to him was blank. He states, "At the very least, the Government memorandum should have been shown to the Trial Court and made a part of the record in this case for review by this Court." (p. 38). The Government will have available a copy of the complete memorandum at oral argument if the Court desires to review it.

without a hearing, that there was no such prosecutorial misconduct as charged by Schwartzbaum. *See United States* v. *De Sapio*, 456 F.2d 644, 651 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972).

D. The Evidence Would Not Have Probably Produced a Different Verdict.

Assuming due diligence on the part of Schwartzbaum, the District Court held that the proper standard in the absence of prosecutorial misconduct for determining whether the evidence justified a new trial was whether it was of such a nature that it would "probably produce a different verdict" (App. 124). This test is unquestionably the law in this Circuit. *United States* v. *Rosner*, 516 F.2d 269, 279 (2d Cir. 1975); *United States* v. *Marquez*, 490 F.2d 1383 (2d Cir. 1974), *aff'g on opinion below*, 363 F. Supp. 802, 806 (S.D.N.Y. 1973), *cert. denied*, 419 U.S. 826 (1974); *United States* v. *De Sapio*, 435 F.2d 272, 286 n. 14 (2d Cir. 1970), *cert. denied*, 402 U.S. 999 (1971).

Schwartzbaum does not directly argue in his Brief here that the District Court's statement of the applicable law was wrong. He does quote the "significant chance" test from *United States* v. *Sperling*, 506 F.2d 1323, 1333 (2d Cir. 1974), *cert. denied*, 420 U.S. 962 (1975), and discusses *United States* v. *Seijo*, 514 F.2d 1357, 1364 (2d Cir. 1975), which applied it—seemingly to suggest that "significant chance" should have been the standard applied here (pp. 31-32). He fails to point out, however, the phrase immediately preceding his quotation from *Sperling* which explained the reason for the application of the different standard there: "the government failed to provide significant Jencks Act materials". 506 F.2d at 1333. Likewise, in *Seijo*, the standard was applied because the Court found "neglect" by the prosecution in failing to turn over an item that was unquestionably in

its files at the time of trial. 514 F.2d at 1364. For the reasons discussed above, however, Schwartzbaum has completely failed to set forth any reason for rejecting the District Court's finding of no prosecutorial misconduct at trial here which would trigger the different standard in *Sperling* and *Seijo*.

Schwartzbaum also claims in his Brief (pp. 29, 31) that he finds "no distinction of substance" between Glasser and the witness in *Mesarosh* v. *United States*, 352 U.S. 1 (1956), and he quotes from a reference to *Mesarosh* in *United States* v. *Polisi*, 416 F.2d 573 (2d Cir. 1969). This Court in *United States* v. *Rosner*, 516 F.2d 269, 279 (2d Cir. 1975), however, observed that *Mesarosh* involved that "rare situation" where a witness had concededly testified "in such a bizarre fashion as to raise the inference that he was either an inveterate perjurer or a disordered mind" and noted that his suspected perjury "was not with respect to his own past." The distinction of *Mesarosh* in *Rosner* should also apply here.

Most of Schwartzbaum's Brief seems to accept the "probably" different verdict standard as legally correct and argues that the evidence should have led the District Court in applying it to come out the other way. His analysis focuses on Glasser's statement at his trial that "[t]here were five firms all together" in addition to Schwartzbaum (Tr. 80) and Glasser's testimony at the *Stofsky* trial about the source of his savings.* He argues in his Brief that the District Court's conclusion that this testimony and the bank records would not have "probably"

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* While Schwartzbaum in his Brief (p. 26) notes that Glasser gave incorrect answers at his trial to questions concerning cash Christmas gifts from manufacturers and gambling on a few occasions, he does not suggest that those incorrect answers had any impact on the jury.

produced a different verdict at his trial * is incorrect for five reasons: it would have been of "enormous value" to show to the jury that Glasser was making false statements to government agents and at trials during the time that he appeared to be cooperating with the Government (pp. 26-28); the large deposits shown in the bank records would have provided "solid evidence" that any money received by Glasser had been kept by him rather than shared with union representatives (p. 27); involvement of a larger number of manufacturers would have "severely undermined" Glasser's testimony since he would not then be "actually capable of remembering" his arrangement with Schwartzbaum (pp. 27, 29-30); testimony corroborating Glasser's testimony was "extremely doubtful" (pp. 30-31); and the District Court emphasized strategic considerations in *Stofsky* that would have led those defendants to avoid bringing out the payments from additional manufacturers, considerations which did not apply to Schwartzbaum (pp. 32-33).

The "enormous value" to Schwartzbaum at the prior trial of the additional information about Glasser for purposes of impeaching his testimony is very dubious. As it was, Schwartzbaum "was not confronted by a witness of assumed moral rectitude". *United States* v. *Rosner*, 516 F.2d 269, 275 (2d Cir. 1975). On the basis of facts brought out during Glasser's testimony Schwartzbaum's counsel was able to state during his summation that Glasser had been granted immunity "to protect himself from 45—45 violations, including income tax evasion." (Summ. 8). Speaking of Glasser's statement to his superiors at the Associated Fur Manufacturers, Inc.,

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* The District Court analyzed the effect of the statements and the bank records in the context of both the past trial and a possible future trial. Schwartzbaum's arguments focus on the past trial.

Schwartzbaum's counsel noted, "He lied to them twice, Mr. Hecht and Mr. Greenberg." (Summ. 8). Schwartzbaum's counsel then continued: "He lied to Detective Civitano. He lied to the Government attorney, Mr. Hinkley. He lied at the prior trial, we have been through that and we will go through that again." (Summ. 8-9). Schwartzbaum's counsel concluded that "if I were to go through the record I'd take the rest of the afternoon to continue referring you to various falsities or evasions in his testimony". (Summ. 17). Surely Schwartzbaum had already reached the point of diminishing returns on this sort of impeachment of Glasser.

As for the bank deposits as "solid evidence" that Glasser kept all the money paid to him by Schwartzbaum and the five other manufacturers he identified at the trial, it is important to remember the various amounts. Schwartzbaum points to testimony by Glasser that during 1967-69 he received $14,000 from the manufacturers he identified and retained approximately $5,000. He then points to Glasser's bank deposits of $84,771.74 during 1967-70 and concludes that Glasser kept all of the $14,000. But deposits exceeding $80,000 show nothing about how Glasser divided $14,000. As the District Court stated, the figures are so "incongruous" as to lead to no conclusion at all (App. 125) and "do not at all indicate that no union officials were involved in the scheme." (App. 280).

Nor does payments from a number of additional fur manufacturers mean that Glasser was not "capable of remembering" what happened with the six, including Schwartzbaum, whom he previously identified. Of the remaining five, three—Sherman, Hessel and Cohen—were indicted in addition to Schwartzbaum for making payments to union officials through Glasser, and they confirmed his recollection of events by pleading guilty. A

fourth, Daniel Ginsberg, testified at the *Stofsky* trial and corroborated Glasser's testimony about payments from him.

As for the other evidence, neither the District Judge, nor apparently the jury,* shared Schwartzbaum's view that the testimony by Chambers was "extremely doubtful". His layman's error confusing testimony before a grand jury and pleading in court to an indictment returned by a grand jury does not undercut the accuracy of Chamber's recollection that Schwartzbaum said that he had paid monies to union officials. The whole discussion about the size of the payments and the little impact that the charges would have on his firm "whatever the outcome" (Tr. 311) support Chamber's recollection of the admission by Schwartzbaum. It is, of course, not surprising that Schwartzbaum attempted to be "very much at ease" and "indicated complete confidence", as Schwartzbaum's Brief (p. 16) notes, during this meeting he had called with his banker for the purpose of giving reassurances about an outstanding $400,000 loan to his firm. And Schwartzbaum in his argument minimizing the other evidence supporting Glasser's testimony completely ignores Jaffee, the union official who confirmed receiving money from Glasser to look the other way about contracting at Schwartzbaum's firm.

Finally, Schwartzbaum argues that the District Court erred in failing to distinguish the different strategic considerations applicable to his case and *Stofsky*. In the first place, Schwartzbaum lifts out of context and unduly emphasizes the section of the District Court's opinion noting that the *Stofsky* defendants would be reluctant to make use of the new trial evidence suggesting payoffs by many more manufacturers. But Schwartzbaum would probably

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* A note from the jury asked to hear again "Mr. Chambers testimony admitting that Mr. Schwartzbaum gave money" (Tr. 438).

be equally reluctant. At the prior trial his counsel brought out in Glasser's testimony and emphasized in his summation that almost all manufacturers engaged in contracting (Tr. 171; Summ. 8). Glasser's prior testimony, however, only referred to payments to be relayed to union officials to buy protection from union sanctions from five other manufacturers. In this posture the jury was led to believe that while everybody did it only a few paid. This state of the testimony was much more favorable to Schwartzbaum than testimony that payoffs by manufacturers were the norm in the industry and he was the exception. The actions by Schwartzbaum's counsel at the prior trial objecting to any questions about Glasser's savings and ignoring the probate records, used in *Stofsky*, are certainly consistent with a desire to avoid giving any suggestion to the jury that Glasser had received moneys from many other manufacturers.

The arguments set forth by Schwartzbaum, therefore, offer no basis for rejecting the District Court's conclusion that the evidence on which Schwartzbaum now relies would not "probably produce a different verdict".

E. There Was No Need For A Hearing For Cross-Examination Of Glasser.

Schwartzbaum's position on the need for a hearing for the purpose of cross-examination of Glasser has fluctuated. The original papers in support of his second new trial motion did not seek one (App. 44-48). The letter from his counsel dated June 3, 1974, replying to the Government's papers submitted in response to his second motion did mention such a hearing, not with respect to his second motion based on newly discovered evidence, but in the context of a request for reconsideration of his first new trial motion "in the interests of justice" to determine if Glasser had "perpetrated a fraud upon the Government" by fail-

ing to disclose previously the names of the additional manufacturers (App. 103-05). Schwartzbaum's original papers in support of his third new trial motion only mentioned examination of Glasser at a hearing in the context of determining when the Government first had evidence that Glasser was lying. The reply affidavit in support of his third new trial motion, however, sets forth five other "issues which may be resolved by a hearing" (App. 251), and those "issues" are also listed in Schwartzbaum's Brief here (pp. 36-37). In contrast to Schwartzbaum's shifting position on the need for a hearing to cross-examine Glasser, the *Stofsky* defendants have been consistent: they never requested such an evidentiary hearing in the District Court, and they do not ask now for a remand to allow such a hearing.

Issue number 1, according to Schwartzbaum, is whether Glasser has "any other bank accounts, safety deposit boxes or hidden assets". It is hard to understand how this is an issue which must be resolved at a post-trial evidentiary hearing, when Schwartzbaum at the trial successfully objected to questions about Glasser's savings as "irrelevant". As issue number 2, Schwartzbaum wants to discover what proof Glasser can offer that he had "other sources of income beyond his salary". That Glasser did have other sources of income seems clear in light of the bank deposits summarized in the Addendum to this Brief. Numbers 3 and 5 are offshoots of Schwartzbaum's argument that Glasser would not be "capable of remembering" the details of his dealings with Schwartzbaum because of the large number of manufacturers involved.* As dis-

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* "3) Can Glasser, now, remember telling Schwartzbaum that union officials were being 'paid off' or, as is more likely, is Glasser now willing to admit that due to the number of different manufacturers he was dealing with and the period of time covered by those deals, he has no specific recollection of what he told to whom?

. . . .

[Footnote continued on following page]

cussed above, characterization of this as "issues" to be resolved at an evidentiary hearing seems far-fetched in light of the corroboration of Glasser's recollection about other manufacturers previously identified from the guilty pleas of three of those manufacturers and the testimony of one as a Government witness at the *Stofsky* trial. Finally, Schwartzbaum as issue number 4 wants a hearing to resolve if Glasser kept all the money for himself and did not give any to union officials. How a hearing is going to resolve this Schwartzbaum does not explain. The testimony of union official Jaffee about his acceptance of payoffs from Glasser suggests that a post-trial hearing on this issue would be a waste of time.

By requesting a remand for an evidentiary hearing Schwartzbaum seeks to force the District Court into an exercise that would probably take many days more than his entire trial and in the event he again loses below provide a ground for a further appeal here. To paraphrase this Court's opinion in *United States* v. *De Sapio*, 456 F.2d 644, 652 (2d Cir.), *cert. denied*, 406 U.S. 933 (1972):

> "The alternative relief sought by appellant is an evidentiary hearing which presumably will provide the opportunity to once again cross-examine [Glasser] and thus hopefully provide the new evidence which has been so clearly lacking here. We see no reason to provide this relief and no precedent for it. In our view the time for finality has come."

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5) In light of the large number of manufacturers that Glasser is now apparently saying he received money from, will he still testify that he has a specific recollection of receiving money from the defendant in this case?"

POINT III

The District Court correctly denied Schwartzbaum's motions to dismiss the indictment.

Schwartzbaum's Brief adopts by reference the arguments in the Appellants' Briefs in *Stofsky* about why the indictments should have been dismissed. The Government's response to those arguments appears in its Brief in *Stofsky*.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

V. THOMAS FRYMAN, JR.,
JOHN C. SABETTA,
Assistant United States Attorneys, Of Counsel.

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Shown in Ba
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	1962	1963	1964	1965	1966	
Deposits Shown In Documents Subpoenaed By Stofsky Defendants						
Cash Deposits						11,15
Check Deposits						1,85
Cash or Check Deposits						5
						13,05
			$ 0.00			
Deposits First Shown In Additional Documents Subpoenaed By Government						
Cash Deposits	4,327.35	6,577.37	6,250.00			
Check Deposits	176.34	55.80	622.01			
Cash or Check Deposits	7,677.50	1,432.04	13,222.79	15,700.00		
	12,181.19	8,065.21	20,094.80	15,700.00		
			$56,041.20			
Total Deposits	12,181.19	8,065.21	20,094.80	15,700.00		13,0
			$56,041.20			

ADDENDUM

tty Glasser Deposits During 1962-73 as nk Records Subpoenaed by Government Defendants (Source: *Stofsky* Supple-endix 43-44, 57-64; *Schwartzbaum* Appendix 197-98, 210-22)

1967	1968	1969	1970	1971	1972	1973	*Total*
1.05	10,950.00	22,500.00	9,650.00				
1.10	942.27	1,318.26	163.80	1,220.40	3,050.91	486.60	
0.00	3,000.00	82.57					
2.15	14,892.27	23,900.83	9,813.80	1,220.40	3,050.91	486.60	
		$61,659.05			$ 4,757.91		$ 66,416.96
	1,190.00	12,018.00	4,550.00	1,214.00	300.00	300.00	
	35.00	2,335.26	2,684.43	2,975.16	2,076.90	3,895.99	
		300.00			578.00	777.93	
	1,225.00	14,653.26	7,234.43	4,189.16	2,954.90	4,973.92	
		$23,112.69			$12,117.98		$ 91,271.87
952.15	16,117.27	38,554.09	17,048.23	5,409.56	6,005.81	5,460.52	
		$84,771.74			$16,875.89		$157,688.83

Form 279 - Affidavit of Service by Mail

AFFIDAVIT OF MAILING

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

V. Thomas Fryman, Jr., being duly sworn, deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

That on the 11thm day of September 1975 he served ~~x~~ copies of the within Brief by placing the same in a properly postpaid franked envelope addressed:

Edward Brodsky, Esq.
Goldstein, Shames & Hyde
655 Madison Avenue
New York, New York 10021

And deponent further says that he sealed the said envelope and placed the same in the mail box ~~drop~~ for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York.

V. Thomas Fryman, Jr.

V. Thomas Fryman, Jr.

Sworn to before me this

11th day of September, 1975

Jeanette Ann Grayeb

JEANETTE ANN GRAYEB
Notary Public, State of New York
No. 24-1541575
Qualified in Kings County
Commission Expires March 30, 1977